In re: WILLIAM J. REINHART AND REINHART STABLES.
HPA Docket No. 99-0013.
Decision and Order filed November 9, 2000.

Horse protection – Entry – Extension of time – Filing date – Atlanta protocol – Admissible evidence – Palpation reliable – Due process – Bias – Administrative law judge independence – Commerce Clause – Tenth amendment – Judicial Officer independence – State sovereignty – Referral to district court – Preponderance of evidence – Hearsay evidence – Civil penalty – Disqualification.

The Judicial Officer affirmed the decision by Judge Edwin S. Bernstein (ALJ): (1) concluding William J. Reinhart violated 15 U.S.C. § 1824(2)(B) by entering a horse at a horse show, for the purpose of showing or exhibiting the horse, while the horse was sore; (2) assessing Mr. Reinhart a $2,000 civil penalty; and (3) disqualifying Mr. Reinhart for 5 years from exhibiting, showing, or entering any horse, and from participating, in any horse show, exhibition, sale, or auction. The Judicial Officer held palpation alone is a reliable method by which to determine whether a horse is "sore" under the Horse Protection Act (HPA) and rejected Respondents' contention that palpation does not comply with the HPA because palpation is not conducted while the horse is moving. The Judicial Officer held that United States Department of Agriculture (USDA) veterinary medical officers' hearsay statements are admissible. The Judicial Officer found that 7 C.F.R. § 1.147(g), which provides that a document is deemed to be filed at the time when it reaches the Hearing Clerk, was not disparately applied to the parties and that *Carroll v. C.I.R.*, 71 F.3d 1228 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996), does not require the Secretary of Agriculture to adopt the mailbox rule to determine the timeliness of filings in USDA proceedings. The Judicial Officer found an agency may combine investigative, adversarial, and adjudicative functions, as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case does not participate in or advise in the decision or agency review in the case or a factually related case (5 U.S.C. § 554(d)). The Judicial Officer found, with minor exceptions, that the ALJ's findings are supported by the evidence. The Judicial Officer rejected Respondents' contentions that: (1) the HPA violates the Commerce Clause of the United States Constitution and the Tenth Amendment; (2) the HPA is unnecessary because the National Horse Show Commission prohibits the showing of sore horses; (3) the HPA encroaches upon the sovereignty of Tennessee, which prohibits the soring of horses; (4) the ALJ erroneously excluded the Atlanta Protocol from evidence; (5) USDA does not admit evidence that contradicts testimony by USDA veterinarians or challenges USDA's "agenda"; and (6) the ALJ and the Judicial Officer are biased in favor of USDA. The Judicial Officer denied Respondents' requests: (1) that the Judicial Officer refer the case to a United States district court, stating the Judicial Officer has no authority to make such a referral; (2) for the citations to decisions in administrative proceedings instituted under the HPA in the United States Court of Appeals for the Fifth Circuit, stating administrative proceedings under the HPA are instituted before the Secretary of Agriculture; and (3) for a free transcript, stating 7 C.F.R. § 1.141(i)(3) provides that transcripts shall be made available at the cost of duplication. The Judicial Officer found Complainant failed to prove by a preponderance of the evidence that Reinhart Stables was a partnership and violated the HPA.

Colleen A. Carroll, for Complainant.
Respondents, Pro se.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Administrator, Animal and Plant Health Inspection Service, United States

Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on March 10, 1999. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [hereinafter the Rules of Practice]. Complainant alleges that on October 28, 1998, William J. Reinhart allowed the entry of a horse called "Double Pride Lady" as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶ 3).

On April 2, 1999, William J. Reinhart filed a Response to the Complaint. In his Response, William J. Reinhart admits he is the owner of Double Pride Lady and admits he allowed the entry of Double Pride Lady at the National Walking Horse Trainers Show in Shelbyville, Tennessee. However, William J. Reinhart denies Double Pride Lady was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)), when he allowed her entry at the National Walking Horse Trainers Show in Shelbyville, Tennessee. (Response.)

On June 28, 1999, Complainant filed a Motion to Amend Complaint and an Amended Complaint. Complainant moved to amend the Complaint to add Reinhart Stables as a respondent (Motion to Amend Compl. ¶ 2). On August 5, 1999, William J. Reinhart filed an untitled document in which he opposed Complainant's Motion to Amend Complaint. On August 24, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] granted Complainant's Motion to Amend Complaint and deemed William J. Reinhart's opposition to Complainant's Motion to Amend Complaint to be William J. Reinhart's and Reinhart Stables' [hereinafter Respondents] Answer to the Amended Complaint (Order Granting Complainant's Motion to Amend Complaint).[1]

The Amended Complaint alleges that on October 28, 1998, Respondents entered and allowed the entry of Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore, in violation of sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)) (Amended Compl. ¶ 6).

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[1]The ALJ also amended the caption of the proceeding which had previously been "*In re William J. Reinhart*" to read "*In re William J. Reinhart, an individual, and Reinhart Stables, an unincorporated association or sole proprietorship*" (Order Granting Complainant's Motion to Amend Complaint). The ALJ appears to have abandoned the caption in his Order Granting Complainant's Motion to Amend Complaint, and I have retained the caption adopted by the ALJ in his June 5, 2000, Decision and Order [hereinafter Initial Decision and Order].

The ALJ presided at a hearing in Nashville, Tennessee, on October 13 and 14, 1999. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. William J. Reinhart represented Reinhart Stables and himself.

On December 10, 1999, Respondents filed a Post-Hearing Brief. On December 27, 1999, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law and Memorandum of Point and Authorities in Support Thereof [hereinafter Complainant's Post-Hearing Brief]. On January 10, 2000, Complainant filed Complainant's Reply to Respondents' Post-Hearing Brief. On January 27, 2000, Respondents filed a Motion for Dismissal and Reply Brief of Respondent.

On June 5, 2000, the ALJ issued an Initial Decision and Order in which the ALJ: (1) concluded that on October 28, 1998, William J. Reinhart, acting as an owner of Reinhart Stables, violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Double Pride Lady, while Double Pride Lady was sore; (2) concluded that Reinhart Stables is merely a name under which William J. Reinhart does business; (3) assessed William J. Reinhart a $2,000 civil penalty; and (4) disqualified William J. Reinhart for 5 years from exhibiting, showing, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (Initial Decision and Order at 4, 13-14).

On July 6, 2000, Respondents appealed to the Judicial Officer. On September 5, 2000, Complainant filed Complainant's Response to Respondents' Appeal of Decision and Order [hereinafter Complainant's Response to Respondents' Appeal Petition] and Complainant's Appeal of Decision and Order [hereinafter Complainant's Appeal Petition]. On September 27, 2000, Respondents filed Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order[2] and Respondent's Response to Complainant's Appeal of Decision and Order.

On October 2, 2000, Respondents filed a motion requesting a list of citations and a motion requesting a transcript of the hearing. On November 1, 2000, Complainant filed responses to Respondents' motion requesting a list of citations

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[2]The Rules of Practice do not provide for a litigant's filing a response to a response to an appeal petition. However, a litigant may file, and I may grant, a motion requesting the opportunity to file a response to a response to an appeal petition. Respondents did not file a motion requesting the opportunity to file a response to Complainant's Response to Respondents' Appeal Petition. Therefore, I have not considered Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order.

and Respondents' motion requesting a transcript of the hearing. On November 3, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision, a ruling on Respondents' motion requesting a list of citations, and a ruling on Respondents' motion requesting a transcript of the hearing.

I have considered the entire record in this proceeding. I have not considered Respondent's Response to Complainant's Response to Respondent's Appeal of Decision and Order.[3] To the extent indicated, I have adopted proposed findings, proposed conclusions, and arguments; otherwise, they have been rejected as irrelevant or not supported by the evidence. Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion of sanctions, as restated.

Complainant's exhibits are designated by "CX"; Respondents' exhibits are designated by "RX"; and transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

. . . .

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that–

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on

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[3]See note 2.

any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that–

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 1824. Unlawful acts

The following conduct is prohibited:

. . . .

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

§ 1825. Violations and penalties

. . . .

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

. . . .

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing

or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

§ 1827. Utilization of personnel of Department of Agriculture and officers and employees of consenting States; technical and other nonfinancial assistance to State

(a) Assistance from Department of Agriculture and States

The Secretary, in carrying out the provisions of this chapter, shall utilize, to the maximum extent practicable, the existing personnel and facilities of the Department of Agriculture. The Secretary is further authorized to utilize the officers and employees of any State, with its consent, and with or without reimbursement, to assist him in carrying out the provisions of this chapter.

(b) Assistance to States

The Secretary may, upon request, provide technical and other nonfinancial assistance (including the lending of equipment on such terms and conditions as the Secretary determines is appropriate) to any State to assist it in administering and enforcing any law of such State designed to prohibit conduct described in section 1824 of this title.

§ 1829. Preemption of State laws; concurrent jurisdiction; prohibition on certain State action

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates

> to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. Nor shall any provision of this chapter be construed to exclude the Federal Government from enforcing the provision of this chapter within any State, whether or not such State has enacted legislation on the same subject, it being the intent of the Congress to establish concurrent jurisdiction with the States over such subject matter. In no case shall any such State take action pursuant to this section involving a violation of any such law of that State which would preclude the United States from enforcing the provisions of this chapter against any person.

15 U.S.C. §§ 1821(3), 1822, 1824(2), 1825(b)(1)-(2), (c), 1827, 1829.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Findings of Fact

1. Respondent William J. Reinhart, doing business as Reinhart Stables, is the owner of a horse known as "Double Pride Lady." William J. Reinhart's mailing address is 3878 Murfreesboro Highway, Manchester, Tennessee 37355. (CX 2, CX 6.)

2. William J. Reinhart employed Jack Stepp, full-time, as a trainer of Double Pride Lady (Tr. 190-91).

3. On October 28, 1998, William J. Reinhart entered for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee (CX 2, CX 3, CX 4, CX 5).

4. At the National Walking Horse Trainers Show, Designated Qualified Persons[4] Mark Thomas and Bob Flynn examined Double Pride Lady. Mark Thomas and Bob Flynn determined Double Pride Lady was sensitive in both front feet and refused to allow Double Pride Lady to be shown at the National Walking Horse Trainers Show. (Tr. 46-47; CX 9, CX 10, CX 15, CX 16, CX 17.)

5. United States Department of Agriculture veterinary medical officers

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[4]A "Designated Qualified Person" or "DQP" is a person who is licensed by a horse industry organization or association having a DQP program certified by the United States Department of Agriculture. The management of any horse show, horse exhibition, horse sale, or horse auction may appoint DQPs to detect and diagnose horses which are sore and to otherwise inspect horses for the purpose of enforcing the Horse Protection Act. (15 U.S.C. § 1823(c); 9 C.F.R. §§ 11.1, .7.)

routinely monitor examinations conducted by Designated Qualified Persons. United States Department of Agriculture veterinary medical officers also randomly select horses, which have been entered at horse shows, and conduct their own examinations to determine whether these horses are sore. Two United States Department of Agriculture veterinary medical officers, Dr. John Edward Slauter and Dr. David C. Smith, were assigned to the National Walking Horse Trainers Show. (Tr. 19-21, 30-31, 87-89, 99.)

6. Dr. Slauter had been practicing veterinary medicine for 27 years at the time of the National Walking Horse Trainers Show. For the past 10 years, Dr. Slauter has been a United States Department of Agriculture veterinary medical officer. Dr. Slauter has personally examined at least 300 horses for compliance with the Horse Protection Act and has overseen inspections of several thousand horses by Designated Qualified Persons. (Tr. 14-17, 20-21.) Dr. Slauter is well qualified to examine horses to determine whether they are "sore" as defined in the Horse Protection Act. I found Dr. Slauter to be a forthright and credible witness.

7. Dr. Slauter observed Designated Qualified Persons Mark Thomas and Bob Flynn examine Double Pride Lady, who "led up to the inspection area very reluctant to move" (CX 9; Tr. 45-47). After Mark Thomas and Bob Flynn had examined Double Pride Lady, finding her to be sensitive on both front feet, Dr. Slauter examined Double Pride Lady (CX 9; Tr. 46-47). Dr. Slauter testified that he did not specifically remember his examination of Double Pride Lady. However, Dr. Slauter testified that he prepared an affidavit (CX 9) and the Summary of Alleged Violations form (CX 6) while his examination of Double Pride Lady was fresh in his mind and that his affidavit and the Summary of Alleged Violations form are accurate. (Tr. 36-37, 40-45.) Dr. Slauter repeatedly palpated Double Pride Lady, finding her to be bilaterally sore. Dr. Slauter found Double Pride Lady to be sore at the pastern of the left front foot just above the bulb of the heel and on the medial and lateral aspects of the pastern of the right front foot. (CX 6, CX 9; Tr. 47.) After Dr. Slauter completed his examination of Double Pride Lady, he asked Dr. Smith to examine Double Pride Lady (Tr. 47-48).

8. Dr. Smith had been practicing veterinary medicine for 11 years at the time of the National Walking Horse Trainers Show. Dr. Smith has been employed by the Animal and Plant Health Inspection Service, United States Department of Agriculture, for the past 3 years. (Tr. 85-86.) Dr. Smith has personally examined approximately 300 to 600 horses for compliance with the Horse Protection Act (Tr. 89). Dr. Smith is well qualified to examine horses to determine whether they are "sore" as defined in the Horse Protection Act. I found Dr. Smith to be a forthright and credible witness.

9. Dr. Smith testified that he did not specifically remember his examination of Double Pride Lady. However, Dr. Smith testified that he prepared an affidavit (CX 10) and the Summary of Alleged Violations form (CX 6) while his examination of Double Pride Lady was fresh in his mind and that his affidavit and the Summary

of Alleged Violations form are accurate. (Tr. 99-103.) Double Pride Lady exhibited consistent and repeatable pain responses each time Dr. Smith palpated Double Pride Lady's pastern on the medial and lateral heel bulbs of the left front foot and on the medial and lateral aspects of the pastern of the right front foot (CX 6, CX 10).

10. After their examinations, Drs. Slauter and Smith agreed Double Pride Lady was bilaterally "sore" as defined in the Horse Protection Act (CX 9, CX 10).

Conclusions of Law

1. On October 28, 1998, Respondent William J. Reinhart, doing business as Reinhart Stables, violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering for the purpose of showing or exhibiting the horse known as "Double Pride Lady" as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore.

2. Respondent Reinhart Stables is merely a name under which Respondent William J. Reinhart does business.

Discussion

Congress found "the soring of horses is cruel and inhumane" and "horses shown or exhibited which are sore, where such soreness improves the performance . . ., compete unfairly with horses which are not sore" (15 U.S.C. § 1822(1)-(2)). Congress made it unlawful to: (1) show or exhibit a sore horse in any horse show or horse exhibition; (2) enter for the purpose of showing or exhibiting a sore horse in any horse show or horse exhibition; or (3) allow the showing of a sore horse in any horse show or horse exhibition. 15 U.S.C. § 1824(2)(A)-(B), (D). The term "sore" describes a horse, which, as a result of the use of a substance or practice, suffers, or can reasonably be expected to suffer, "physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving" (15 U.S.C. § 1821(3)).

Based on the credible testimony of Drs. Slauter and Smith, I find Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on October 28, 1998. Drs. Slauter and Smith, who examined Double Pride Lady, are experienced and qualified veterinarians and were credible witnesses. Each veterinarian independently palpated Double Pride Lady's pasterns. Double Pride Lady exhibited strong and definite pain responses to each veterinarians' palpation of her forelimbs. (Tr. 47, 100; CX 9, CX 10.) Abnormal sensitivity in a horse's forelimbs raises a rebuttable presumption that the horse has been sored (15 U.S.C. § 1825(d)(5)).

Respondents contend that palpation alone is not sufficient to determine whether

a horse is sore. Respondents also believe that Dr. Slauter's and Dr. Smith's examinations of Double Pride Lady should be deemed unreliable because Complainant fails to "cite one scientific study or any medical data" that supports palpation as a reliable means for determining soreness in horses (Tr. 12-13, 328-29) and because Dr. Slauter and Dr. Smith failed to examine Double Pride Lady in accordance with the procedures recommended in the Atlanta Protocol (RX 1).[5] Respondents also cite *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), in support of their position that digital palpation alone is not a reliable method by which to determine whether a horse is sore (Respondents' Post-Hearing Brief at 10-11; Tr. 251-59).

The United States Department of Agriculture has used palpation to determine whether a horse is sore within the meaning of the Horse Protection Act for the past 30 years. The Judicial Officer and the two circuits in which this case may be appealed have held palpation to be the accepted method for determining whether a horse is sore. In *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1412-14 (6th Cir. 1995), the Court held that "pursuant to the [Horse Protection Act], the agency need not show inflammation or lameness in addition to a pain reaction in order to conclude that a horse is 'sore[,]'" and a horse's reaction to digital palpation alone is sufficient to invoke the presumption that the horse is sore. In the other circuit in which this case may be appealed, the United States Court of Appeals for the District of Columbia Circuit held in *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49-50 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995), palpation is an effective method for concluding that a horse is sore. In *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 957-60 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 5, 1997), the Judicial Officer held that the scientific basis for palpation is not necessary to be shown, and in *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81 (1996), the Judicial Officer rejected the Atlanta Protocol and held "palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act."

Respondents also contend the United States Department of Agriculture veterinary medical officers' affidavits and Summary of Alleged Violations form (CX 6, CX 9, CX 10) are inadmissible hearsay because they were prepared in anticipation of litigation and do not meet the standard of evidence that was set out

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[5]The Atlanta Protocol is a memorandum authored by six veterinarians. The Atlanta Protocol contains procedures which the authors recommend Designated Qualified Persons follow when conducting inspections of horses at horse shows, horse exhibitions, horse sales, and horse auctions. Specifically, the authors of the Atlanta Protocol recommend that Designated Qualified Persons examine horses for inflammation and lameness, as well as for responses to digital palpation of the limbs. (RX 1.) The ALJ did not receive the Atlanta Protocol in evidence. However, the ALJ ordered the Atlanta Protocol marked as RX 1 and retained in the record as a rejected exhibit. (Tr. 259, 310-11.)

in *Young*, 53 F.3d 728 (5th Cir. 1995) (Respondents' Post-Hearing Brief at 8-9). Respondents cite *Palmer v. Hoffman*, 318 U.S. 109 (1943), which held that an accident report prepared by a railroad company did not carry the indicia of reliability of a routine business record because the accident report was prepared at least partially in anticipation of litigation and also cite *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979), which held that an affidavit prepared by an official of the United States Treasury Department was unreliable because the affidavit was prepared in anticipation of litigation (Respondents' Post-Hearing Brief at 9). Respondents further rely on the Fifth Circuit's holding in *Young*, 53 F.3d at 731, that the probative value of the United States Department of Agriculture veterinary medical officers' affidavits is limited because the affidavits were prepared in anticipation of litigation and because the affidavits only described observations supporting the conclusion that the horse in question was sore.

Dr. Slauter's and Dr. Smith's affidavits and the Summary of Alleged Violations form (CX 6, CX 9, CX 10) are reliable and probative hearsay statements. Under the Rules of Practice, 7 C.F.R. § 1.141(h), and the Administrative Procedure Act, 5 U.S.C. § 556(d), hearsay statements are admissible into evidence. As held in *In re Kim Bennett*, "the business of the Animal and Plant Health Inspection Service under the Horse Protection Act is investigating and litigating, where violations are found. As law enforcement officers, it is the duty of [veterinary medical officers] to detect violations of the federal statute and to initiate the procedure for bringing disciplinary complaints against the violators. Hence, litigating is 'the inherent nature of the business in question' . . ., and the preparation of the Summary of Alleged Violations form and affidavits is the most important of the 'methods systematically employed for the conduct of the business as a business.'" *In re Kim Bennett*, 55 Agric. Dec. at 213-14 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 115 (1943)).

This case cannot be appealed to the United States Court of Appeals for the Fifth Circuit. Therefore, the *Young* decision does not govern. The United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Sixth Circuit are the appellate courts that may hear this matter and, as such, their views will determine whether hearsay is admissible. In *Crawford*, 50 F.3d at 49, the District of Columbia Circuit confirmed that administrative agencies are not barred from reliance on hearsay evidence, which only need bear satisfactory indicia of reliability. Likewise, the Sixth Circuit held in *Bobo*, 52 F.3d at 1412-14, that the affidavits of and the Summary of Alleged Violations forms completed by four veterinary medical officers were sufficient to invoke the presumption, for the purpose of charges against the owner, that the horse in question was "sore" as defined by the Horse Protection Act, despite the contention that the affidavits were hearsay. Although in *Bobo*, three of the United States Department of Agriculture veterinary medical officers testified that they were unable to independently recall their examinations of the horse in question, they stated that they documented their

examinations in written statements and signed their written statements while the details of their examinations were fresh in their minds. The Court emphasized that the written forms and affidavits contained great detail concerning the examinations of the horse in question, and the owner and trainer were given the opportunity to cross-examine the United States Department of Agriculture veterinary medical officers as to the content of these reports. *Bobo*, 52 F.3d at 1414.

In the instant proceeding, both Dr. Slauter and Dr. Smith testified that they did not recall their examinations of Double Pride Lady. However, they also testified that they completed the Summary of Alleged Violations form and documented their findings in affidavits while the facts were still fresh in their minds. (Tr. 31-32, 36-37, 40-45, 99-103.) Respondents had the opportunity to cross-examine Dr. Slauter and Dr. Smith regarding the content of their affidavits and the Summary of Alleged Violations form. Moreover, Dr. Slauter's affidavit, Dr. Smith's affidavit, and the Summary of Alleged Violations form contain great detail concerning the examinations of Double Pride Lady (CX 6, CX 9, CX 10). Therefore, these hearsay statements are reliable, probative, and admissible.

Respondents presented three witnesses: (1) William J. Reinhart's wife, Judith Reinhart; (2) Double Pride Lady's trainer, Jack Stepp, who was sanctioned by the National Horse Show Commission in connection with the entry of Double Pride Lady at the National Walking Horse Trainers Show on October 28, 1998 (Tr. 282-86); and (3) the steward at the National Walking Horse Trainers Show, Charles L. Thomas. None of Respondents' witnesses examined Double Pride Lady for compliance with the Horse Protection Act. Charles L. Thomas, who is a Designated Qualified Person, was only serving as a steward at the National Walking Horse Trainers Show. He merely viewed Double Pride Lady's movement but did not palpate her. Charles L. Thomas testified that, when he observed Double Pride Lady, he formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act and could not testify whether Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the Natonal Walking Horse Trainers Show. (Tr. 127, 138, 145-50.) Respondents' evidence fails to rebut Complainant's evidence that Double Pride Lady was sore when William J. Reinhart entered her at the National Walking Horse Trainers Show in Shelbyville, Tennessee, on October 28, 1998.

Respondents further contend the Horse Protection Act is unconstitutional as it does not fall within the confines of the Commerce Clause of the United States Constitution. Respondents rely on *United States v. Lopez*, 514 U.S. 549 (1995), which held that the Gun-Free School Zones Act of 1990 was invalid as it went beyond Congress' power to regulate commerce. The Gun-Free School Zones Act of 1990 made the intentional possession of a firearm in a school zone a federal offense. *Lopez*, 514 U.S. at 551. The Court in *Lopez* held that the activity being regulated must substantially affect interstate commerce and bringing guns onto a school ground does not have a great enough effect on interstate commerce to qualify

for regulation under the Commerce Clause. Respondents compare their case to *Lopez* and argue that participation in a Tennessee walking horse exhibition does not have a substantial enough effect on interstate commerce to warrant regulation under the Commerce Clause. Respondents emphasize that the prizes are minimal (only $100 or so) and argue that these shows are presented merely for leisurely purposes.

In another case concerning Congress' power to regulate under the Commerce Clause, the Supreme Court in *United States v. Morrison*, 120 S. Ct. 1740 (2000), confirmed the holding that Congress' power to regulate through the Commerce Clause is allowed only in situations in which the activity to be regulated, if not a channel or instrumentality of interstate commerce, substantially affects interstate commerce. In *Morrison*, the Court invalidated a federal statute that provided a federal civil remedy for victims of gender-motivated crimes. The Court held that crimes that are gender-motivated are not economic activity and their results do not affect interstate commerce.

While an administrative law judge may not dismiss a case based upon a finding of unconstitutionality of the statute under which the case is instituted, the administrative law judge may render an opinion on the issue. *See Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958); *In re Utica Packing Co.*, 39 Agric. Dec. 590, 599 (1980). I do not agree that the Horse Protection Act is unconstitutional.

Lopez identified the three categories of activity that Congress may regulate under the Commerce Clause. Congress may regulate the use of channels of interstate commerce (roadways, railways, etc.); Congress may regulate and protect the instrumentalities of interstate commerce or persons and things in interstate commerce; and Congress may also regulate activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. *See Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941). The activities regulated under the Horse Protection Act fall within the third category, as they have a substantial effect on interstate commerce.

The Horse Protection Act regulates an industry, not just a leisurely activity, as Respondents contend. Although this industry only provides minimal monetary returns in the form of prizes for the owner, it is an occupation for the individuals who prepare the horses for competition. Those who train, groom, and transport the horses would be adversely affected if the Horse Protection Act were not in place. Not only does the soring of horses endanger the health of the animals, but it also could affect the employment status of those who service horses that are unfairly disadvantaged.

Respondents also argue the Horse Protection Act encroaches upon the sovereignty of the State of Tennessee, which also has a statute prohibiting the soring of horses. A federal statute may be found to encroach upon the sovereignty of a

state if: (1) the federal statute compels a state to enact or enforce a particular law;[6] (2) the federal statute compels state or local officials to perform specific federal administrative tasks;[7] or (3) the federal statute infringes on the authority of the people of a state to determine the qualifications for office of state government officials.[8] The Horse Protection Act does not require the State of Tennessee to enact or enforce any law, does not require state or local officials to perform federally delegated tasks, and does not infringe on the authority of the people of the State of Tennessee to determine qualifications for office of state government officials. The United States Department of Agriculture polices horse shows, using its own employees, and holds violators accountable through its own administrative law procedures. The State of Tennessee may still enforce its own statute and is not required to administer or enforce the Horse Protection Act (15 U.S.C. §§ 1827, 1829). Therefore, the Horse Protection Act does not encroach upon the sovereignty of the State of Tennessee.

Respondents also filed a Motion for Dismissal on January 27, 2000. In the Motion for Dismissal, Respondents argue that the Complaint should be dismissed because of an extension granted to Complainant to file Complainant's Post-Hearing Brief. Respondents' Motion for Dismissal is denied. The extension was appropriate and caused no prejudice to Respondents.

Sanctions

The Horse Protection Act authorizes the assessment of a civil penalty of not more than $2,000 for each violation. 15 U.S.C. § 1825(b)(1). The Horse Protection Act also authorizes the disqualification, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction, of any person who is assessed a civil penalty. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation. 15 U.S.C. § 1825(c).

Complainant requests that I assess William J. Reinhart a $2,000 civil penalty and disqualify William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. Complainant also requests that any period of disqualification imposed on William J. Reinhart in this Decision and Order be consecutive to, rather than concurrent with, the disqualification of William J. Reinhart in *In re Jack Stepp*, 57 Agric. Dec. 297

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[6] *See New York v. United States*, 505 U.S. 144 (1992).

[7] *See Printz v. United States*, 521 U.S. 898 (1997).

[8] *See Gregory v. Ashcroft*, 501 U.S. 452 (1991).

(1998), *aff'd sub nom. Reinhart v. United States Dep't of Agric.*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). Complainant also requests that I assess Reinhart Stables a $2,000 civil penalty and disqualify Reinhart Stables from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for 1 year.

The main purpose of the Horse Protection Act is to prevent the cruel, inhumane, and unfair practice of soring horses. Since deterrence is the goal of the Horse Protection Act, monetary penalties are not enough to achieve this goal. The Judicial Officer has held that disqualification is an appropriate sanction in almost every Horse Protection Act case. In *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1951-52 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983), the Judicial Officer stated:

> Congress has provided the Department with the "tools" needed to eliminate the practice of soring Tennessee Walking Horses. But they must be used, to be effective. In order to achieve the Congressional purpose of the Act, it would seem necessary to impose at least the minimum disqualification provisions of the 1976 amendments on every horse owner (and trainer) who allows one of his horses to be exhibited while sore. [Footnote omitted.]

See also In re John Allan Callaway, 52 Agric. Dec. 272, 295-96 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20, 60-61 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

William J. Reinhart has violated the Horse Protection Act before. *See In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd sub nom. Reinhart v. United States Dep't of Agric.*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). Therefore, I find disqualification of William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for the minimum 5-year period for a second violation of the Horse Protection Act, to be an appropriate sanction. 15 U.S.C. § 1825(c).

As far as sanctions for Reinhart Stables are concerned, the evidence indicates that Reinhart Stables is merely a name under which William J. Reinhart was conducting business. Thus, sanctioning Reinhart Stables would be redundant. Therefore, I conclude the sanctions requested by Complainant for Reinhart Stables are inappropriate.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents' Appeal Petition

Respondents raise 15 issues in their Petition for Review [hereinafter Respondents' Appeal Petition]. First, Respondents contend the ALJ erroneously accepted and considered Complainant's Post-Hearing Brief, which Respondents contend Complainant filed late (Respondents' Appeal Pet. at 3).

The ALJ ordered Complainant to "mail" Complainant's Post-Hearing Brief no later than December 10, 1999 (Tr. 332). On December 7, 1999, Complainant requested that the ALJ extend the time for "filing and mailing" Complainant's Post-Hearing Brief to December 23, 1999 (Motion to Amend Briefing Schedule). On December 7, 1999, the ALJ extended the time for "filing" Complainant's Post-Hearing Brief to December 23, 1999 (Order Extending Briefing Schedule). On December 14, 1999, Respondents requested that the ALJ reconsider the extension of time granted to Complainant for filing Complainant's Post-Hearing Brief (Statement in Opposition to Government's Motion for Extension of Time to File Briefs). On December 15, 1999, the ALJ rejected Respondents' request (Order).

Complainant did not file Complainant's Post-Hearing Brief until December 27, 1999. However, Complainant asserts Complainant's Post-Hearing Brief was timely filed, as follows:

> On December 23, 1999, Department of Agriculture employees were given early dismissal because of the Christmas holiday, and the Office of the Hearing Clerk closed early. Counsel for [C]omplainant, by telephone, requested and was granted leave to file [C]omplainant's [P]ost-[H]earing [B]rief on the following business day, December 27, 1999. (December 24th was a federal holiday). The extension of time was for good cause, in accordance with the Rules of Practice. 7 C.F.R. § 1.147(f).
>
> The [C]omplainant's [P]ost-[H]earing [B]rief was filed on December 27, 1999, and was timely filed in accordance with the Rules of Practice. 7 C.F.R. § 1.147(g).

Complainant's Response to Respondents' Appeal Petition at 3.

Complainant does not cite, and I cannot locate, any filing by the ALJ granting Complainant's oral request to extend the time for filing Complainant's Post-Hearing Brief to December 27, 1999. I find the lack of any filing granting Complainant's oral request for an extension of time, troubling. However, Respondents raised the issue of the timeliness of Complainant's Post-Hearing Brief before the ALJ in a Motion for Dismissal filed January 27, 2000. The ALJ denied Respondents' Motion for Dismissal stating "the extensions were appropriate and caused no prejudice to Respondent[s]." (Initial Decision and Order at 11.) Based on the ALJ's ruling on Respondents' Motion for Dismissal, I find Complainant orally requested that the ALJ extend the time for filing Complainant's Post-Hearing Brief

to December 27, 1999, and the ALJ orally granted Complainant's request. Therefore, I find Complainant timely filed Complainant's Post-Hearing Brief on December 27, 1999, and I reject Respondents' contention that the ALJ erroneously accepted and considered Complainant's Post-Hearing Brief.

Second, Respondents contend the disparate application of section 1.147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) to parties in administrative proceedings conducted under the Rules of Practice violates Respondents' right to due process of law. Specifically, Respondents contend the Judicial Officer strictly applies 7 C.F.R. § 1.147(g) to the respondents in administrative proceedings and rejects documents filed by respondents that do not timely reach the Hearing Clerk. Respondents contend that, in contrast to the strict application of 7 C.F.R. § 1.147(g) to the respondents, the Judicial Officer accepts and considers documents filed by complainants that do not timely reach the Hearing Clerk. Respondents cite *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), as an example of the Judicial Officer's disparate treatment of the respondents and the complainants in administrative proceedings conducted under the Rules of Practice. (Respondents' Appeal Pet. at 3-5.)

Section 1.147(g) of the Rules of Practice provides that any document or paper filed in an administrative proceeding conducted under the Rules of Practice shall be deemed to be filed at the time when it reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

As an initial matter, the purported disparate application of 7 C.F.R. § 1.147(g) to litigants in prior proceedings is not relevant to this proceeding. Respondents' argument that they have been denied due process in this proceeding because the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to litigants in prior administrative proceedings is without merit.

Moreover, the Judicial Officer has been punctilious about the application of 7 C.F.R. § 1.147(g) to the complainants, as well as the respondents, in

administrative proceedings conducted under the Rules of Practice.[9] Nothing in *In re Jack Stepp* supports Respondents' contention that the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to the litigants in that proceeding.

The Rules of Practice are binding on administrative law judges and the Judicial Officer,[10] and administrative law judges and the Judicial Officer have very limited authority to modify the Rules of Practice in a proceeding.[11] Even if an

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[9]*See e.g. In re Jeanne and Steve Charter*, 59 Agric. Dec. ___, slip op. at 4 n.1 (Sept. 22, 2000) (in which the Judicial Officer rejected the complainant's response to the respondents' appeal petition because the complainant's response reached the Hearing Clerk 1 day after the response was due); *In re Peter A. Lang*, 57 Agric. Dec. 59 (1998) (in which the Judicial Officer denied the complainant's oral request for an extension of time on the date the complainant's response to the respondent's appeal petition was due because the complainant made the oral request 13 minutes after the Hearing Clerk's office closed and, when the complainant nonetheless filed a response to the respondent's appeal petition, the Judicial Officer refused to consider the complainant's late-filed response), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3).

[10]*See In re Jack Stepp*, 59 Agric. Dec. ___, slip op. at 6 n.2 (May 23, 2000) (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay) (stating the Rules of Practice are binding on the Judicial Officer, and the Judicial Officer cannot deem the respondents' late-filed Reply to Motion to Lift Stay to have been timely filed); *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___, slip op. at 15-17 (Mar. 31, 2000) (Order Denying Pet. for Recons.) (stating the administrative law judges and the Hearing Clerk are bound by the Rules of Practice and neither the administrative law judges nor the Hearing Clerk has the authority to modify the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating the Judicial Officer and the administrative law judge are bound by the Rules of Practice); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating the Judicial Officer and the administrative law judge are bound by the Rules of Practice). *Cf. In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating the Judicial Officer has no authority to depart from the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders).

[11]*See In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990

administrative law judge or the Judicial Officer was presented with a circumstance in which the administrative law judge or the Judicial Officer had authority to modify the Rules of Practice, I cannot now conceive of a circumstance in which an administrative law judge or the Judicial Officer would modify 7 C.F.R. § 1.147(g) in a manner which would result in the disparate application of 7 C.F.R. § 1.147(g) to litigants in a proceeding.

The record in this proceeding does not reveal that the ALJ or the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to the parties. All of Respondents' and Complainant's filings have been timely filed. Neither the ALJ nor the Judicial Officer has rejected a filing in this proceeding because it did not timely reach the Hearing Clerk. Therefore, I find no basis for Respondents' contention that the Judicial Officer disparately applied 7 C.F.R. § 1.147(g) to Respondents and Complainant, and I find no basis for Respondents' contention that the disparate application of 7 C.F.R. § 1.147(g) to Respondents and Complainant denied Respondents due process under the Fifth Amendment to the United States Constitution.

Third, Respondents contend section 1.147(g) of the Rules of Practice (7 C.F.R. § 1.147(g)) is contrary to *Carroll v. C.I.R.*, 71 F.3d 1228 (6th Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996). Respondents assert that *Carroll* requires federal administrative agencies to provide that the effective date of filing in administrative proceedings is the date a properly addressed document, bearing proper postage, and sent by regular mail, is postmarked [hereinafter the mailbox rule]. (Respondents' Appeal Pet. at 3, 5.)

None of Respondents' filings have been rejected because they did not timely reach the Hearing Clerk, as provided in 7 C.F.R. § 1.147(g). Therefore, the application to this proceeding of 7 C.F.R. § 1.147(g), rather than the mailbox rule, has not resulted in the rejection of any of Respondents' filings. Even if I found that the Secretary of Agriculture is required by *Carroll* to apply the mailbox rule to this proceeding (which I do not find), that finding would have no effect on the timeliness of Respondents' filings. Under these circumstances, I find Respondents' contention that the mailbox rule must be applied to determine the effective date of filing has no relevance to this proceeding.

Moreover, in *Carroll*, the United States Court of Appeals for the Sixth Circuit did not hold that federal agencies must adopt the mailbox rule in administrative proceedings, as Respondents assert. Instead, the Sixth Circuit found that the petitioners in *Carroll* could not invoke the common law presumption that the Internal Revenue Service received their properly addressed communication bearing

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(16 U.S.C. § 620b(c)(3)(A)); and holding the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

proper postage after the normal 2- or 3-day interval necessary for United States Postal Service delivery. *Carroll*, 71 F.3d at 1230, 1233. I find *Carroll* inapposite. Nothing in *Carroll* requires the Secretary of Agriculture to adopt the mailbox rule in this proceeding or any other United States Department of Agriculture administrative proceeding.

Fourth, Respondents contend the ALJ erroneously excluded the Atlanta Protocol. Specifically, Respondents contend the ALJ's exclusion of the Atlanta Protocol is reversible error because: (1) months before the hearing, Respondents listed the Atlanta Protocol as one of the documents which they would introduce at the hearing; (2) Respondents laid the proper foundation for the Atlanta Protocol through Charles L. Thomas; and (3) the United States Court of Appeals for the Fifth Circuit in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), accepted and relied on the Atlanta Protocol. (Respondents' Appeal Pet. at 5-9.)

I disagree with Respondents' contention that their listing the Atlanta Protocol as a document, which they would introduce at the hearing, requires the ALJ to admit the Atlanta Protocol into evidence. Section 1.140(a)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.140(a)(1)(iii)) provides that an administrative law judge may order each party to furnish copies of or a list of documents which that party anticipates introducing at the hearing. On May 11, 1999, pursuant to 7 C.F.R. § 1.140(a)(1)(iii), the ALJ issued an order requiring Complainant and Respondents to exchange copies of proposed hearing exhibits (Summary of Telephone Conference ¶ 2). On August 31, 1999, Respondents filed with the Hearing Clerk a list of the witnesses they intended to call and a list of the documents they intended to introduce at the hearing. Respondents listed the Atlanta Protocol as one of the documents which they intended to introduce into evidence. (Respondent's List of Witnesses and Exhibits.) However, the act of filing a list of documents, which a party anticipates introducing at the hearing, does not require the administrative law judge presiding at the hearing to admit the listed documents into evidence.

Section 1.141(h)(1)(iv) of the Rules of Practice provides that evidence may be excluded, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) Evidence–(1) *In general.*
>
> . . . .
>
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Therefore, even if a party identifies a document as one which that party

anticipates introducing into evidence, the administrative law judge presiding at the hearing may exclude the document because it is immaterial, irrelevant, unduly repetitious, or not the sort upon which responsible persons are accustomed to rely.

Respondents attempted to introduce the Atlanta Protocol through Jack Stepp, who could not authenticate the Atlanta Protocol, and the ALJ properly excluded the Atlanta Protocol, as follows:

> MS. CARROLL: Your Honor, could I also note for the record an objection on foundation grounds? Unless Mr. Stepp is going to testify that he participated in the preparation of this document, I think there's a foundation problem and an authentication problem.
>
> JUDGE BERNSTEIN: Well, I think someone should probably explain what this document is. Mr. Reinhart?
>
> MR. REINHART: Yes?
>
> JUDGE BERNSTEIN: Someone should explain what this document is.
>
> MR. REINHART: Yes, I'll be glad to. Would you like me to explain it now?
>
> MS. CARROLL: He's not under oath.
>
> JUDGE BERNSTEIN: You're not under oath.
>
> MR. REINHART: Oh, well, could you explain what the document is, Mr. Stepp?
>
> THE WITNESS: It's just --
>
> JUDGE BERNSTEIN: I don't want you to read it, just tell me where it came from.
>
> THE WITNESS: What it tells me is that --
>
> JUDGE BERNSTEIN: No, I don't want you to tell me what it says, I want you to tell me where it came from, what's the background of this?
>
> THE WITNESS: Well, a group of veterinarians and doctors, it was in the early '90s sometime I think, they went to down in Georgia and they set down the rules and regulations governing the --

JUDGE BERNSTEIN: So this is what they think should be the standards for evaluating horses.

THE WITNESS: Horses, yes, sir.

MS. CARROLL: Same objection unless any of those -- the authors of this document are here to be cross examined. Mr. Stepp doesn't -- I assume didn't participate in this and doesn't -- cannot be cross examined on the validity of the statements in here. This is a third party document and as such it's hearsay, it's not regulations, it's opinions of third parties who are not available for cross examination. And it is offered, I assume, to establish the truth of the statements that it contains.

MR. REINHART: It was accepted as evidence in the Fifth Circuit.

JUDGE BERNSTEIN: One moment. I've had cases way back in which I've had veterinarians testify about it, but that's not the case here. I think the objection is well-founded and I will reverse my ruling and not admit the document, since it is hearsay of a type that should not be admitted.

Tr. 257-59.

I also disagree with Respondents' contention that the ALJ's exclusion of the Atlanta Protocol is reversible error because they laid the proper foundation for the Atlanta Protocol through Charles L. Thomas (Respondents' Appeal Pet. at 5-6). I thoroughly reviewed Charles L. Thomas' testimony and cannot locate any testimony about the Atlanta Protocol (Tr. 126-73). Therefore, I reject Respondents' contention that they laid the proper foundation for the Atlanta Protocol through Charles L. Thomas.

Further, I disagree with Respondents' contention that the ALJ's exclusion of the Atlanta Protocol is reversible error because the United States Court of Appeals for the Fifth Circuit, in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995), accepted and relied on the Atlanta Protocol (Respondents' Appeal Pet. at 6, 8-9).

Appeal in this proceeding does not lie to the United States Court of Appeals for the Fifth Circuit. Moreover, the two circuits in which this case may be appealed rejected the position taken by Respondents, which is similar to the conclusion in the Atlanta Protocol, that palpation alone is not sufficient to determine whether a horse is sore. In *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1412-14 (6th Cir. 1995), the Court held that, pursuant to the Horse Protection Act, the United States Department of Agriculture need not show inflammation or lameness, in addition to a pain reaction, in order to conclude that a horse is sore under the Horse Protection Act and that a finding of soreness based on the results of digital palpation alone is

sufficient to raise the presumption that a horse is sore. In the other circuit to which appeal in this proceeding lies, the United States Court of Appeals for the District of Columbia Circuit held that palpation, whether used alone or not, is an effective diagnostic technique by which to determine whether a horse is sore. *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 50 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995). Thus, I conclude the ALJ's failure to follow *Young* is not error.

Even if Respondents could appeal to the United States Court of Appeals for the Fifth Circuit, I would find *Young* inapposite. The Court in *Young* held that digital palpation alone is not a reliable method by which to determine whether a horse is sore. However, the holding in *Young* is based upon a number of factors that are not present in this proceeding. In *Young*, several "highly qualified expert witnesses" testified for the respondents that "soring could not be diagnosed through palpation alone." *Young*, 53 F.3d at 731. Respondents, in this proceeding, did not introduce expert witness testimony that soring could not be diagnosed through palpation alone. Moreover, Dr. Slauter and Dr. Smith based their determinations that Double Pride Lady was sore not only on Double Pride Lady's reaction to palpation, but also on their observations of Double Pride Lady's movement (Tr. 46, 108-09; CX 9, CX 10).

In *Young*, two private veterinarians and one off-duty Designated Qualified Person testified they examined the horse in question immediately after United States Department of Agriculture veterinary medical officers found the horse was sore. These private veterinarians and the off-duty Designated Qualified Person testified they did not find the horse to be sore. *Young*, 53 F.3d at 731-32. The record in this proceeding does not contain any testimony regarding an examination of Double Pride Lady immediately after Drs. Slauter and Smith concluded their examinations. Moreover, Mark Thomas and Bob Flynn, the two Designated Qualified Persons who examined Double Pride Lady at the National Walking Horse Trainers Show, determined that Double Pride Lady was sensitive in both front feet, issued a ticket for bilateral soring, and refused to allow Double Pride Lady to be shown at the National Walking Horse Trainers Show. (Tr. 46-47; CX 9, CX 10, CX 15, CX 16, CX 17.)

In *Young*, the administrative law judge found the respondents' witnesses to be more credible than the complainant's witnesses. *Young*, 53 F.3d at 732. In the instant proceeding, the ALJ found Dr. Slauter and Dr. Smith forthright and credible witnesses and Dr. Slauter's affidavit (CX 9), Dr. Smith's affidavit (CX 10), the Summary of Alleged Violations form (CX 6), and Drs. Slauter's and Smith's testimony reliable (Initial Decision and Order at 3, 5, 7-8). The ALJ also found Respondents' three witnesses, none of whom examined Double Pride Lady for compliance with the Horse Protection Act, failed to rebut Complainant's evidence that Double Pride Lady was sore (Initial Decision and Order at 8).

Finally, in *Young*, the administrative law judge dismissed the complaint and the Judicial Officer reversed the administrative law judge. *Young*, 53 F.3d at 732. In

the instant proceeding, the ALJ and the Judicial Officer agree that the evidence supports the conclusion that William J. Reinhart violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) by entering for the purpose of showing or exhibiting Double Pride Lady as entry number 146 in class number 21 at the National Walking Horse Trainers Show in Shelbyville, Tennessee, while Double Pride Lady was sore.

Therefore, I find *Young* inapposite. I find the ALJ did not err by failing to follow the holding in *Young v. United States Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995).

Fifth, Respondents contend that "palpation is not in compliance with the Horse Protection Act because this examination is conducted while the horse is standing still with one foot off the ground in an unnatural position and not while 'moving' as the [Horse Protection] Act requires." (Respondents' Appeal Pet. at 8.)

I disagree with Respondents' contention that the Horse Protection Act requires that horses must be examined while they are moving. Respondents appear to be confusing the definition of "sore" under the Horse Protection Act with an examination used to determine if a horse is sore. Under the Horse Protection Act, the term "sore" describes a horse, which, as a result of the use of a substance or practice, suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness *when moving*. However, the Horse Protection Act does not specify the examination required to make the finding that the horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when moving.

Dr. Slauter testified he can determine, based upon a horse's reaction to palpation, whether it is reasonable to expect that the horse will experience pain when moving, as follows:

> BY MS. CARROLL:
>
> Q. I may have already asked this, but if I have, please let me know.
>
> I wanted to ask how you determine that what the horse is presenting to you during your examination is a response to pain rather than to some other condition.

[BY DR. SLAUTER:]

A. There's a number of conditions that can cause pain, but when you get on a horse's foot and you find localized areas of pain, local lesions, localized areas of pain that are consistent and repeatable, and in this case the horse that we're talking about here today, it was bilateral, areas of consistent repeatable pain, localized areas of pain, not just on one foot, but two feet. And you do not see that generalized areas of pain around the pastern, but you see areas of -- localized areas of pain where you go back and you consistently repeatedly get those pain responses and those are areas where action devices will hit, on those localized areas, and if that horse is exhibiting pain when it's not moving or at least when I have my hands on its foot, it's not moving, it's reasonable for me to expect that when that horse gets into the show ring, you know, hit with speed and the action devices on this particular horse coming down on those areas, that that horse will experience even more pain and stress on his front limbs.

Tr. 29-30.

Similarly, Dr. Smith testified he determined, based upon Double Pride Lady's reaction to palpation, that Double Pride Lady would have suffered pain if she had been shown at the National Walking Horse Trainers Show, as follows:

[BY MS. CARROLL:]

Q. Can you tell from your documentation whether this horse would have been in pain if it had been shown in the ring immediately following your examination?

[BY DR. SMITH:]

A. Yes.

Q. And what do you base that opinion on?

A. The locations of the painful areas on both those forefeet would be areas where an action device would fall.

Q. And what is -- how does that tell you that the horse would be in pain?

A. If the horse feels pain when I am pressing on the painful areas gently, with the flat of my thumb, certainly the pressure of a chain coming down on that area as the horse not only walks but canters, trots in the ring, would

definitely cause pain to the horse.

Q. Would that be the case -- would there be pain if there were not action devices?

A. Well, the fact that I can elicit pain just by touching him, I think indicates that the area is painful. Action devices would certainly enhance that pain.

Tr. 106-07.

Moreover, Dr. Slauter and Dr. Smith did observe Double Pride Lady's movement and, in part, based their determinations that Double Pride Lady was sore on their observations of her movement (CX 9, CX 10). Drs. Slauter and Smith testified about Double Pride Lady's movement and the conclusions they drew from the manner in which Double Pride Lady moved, as follows:

[BY MS. CARROLL:]

Q. And can you tell from your documentation whether this horse would have been in pain if it had been shown in the ring?

[BY DR. SLAUTER:]

A. Yes, in my professional opinion, that horse would have experienced pain in the show ring.

Q. And what is that opinion based on?

A. It's based on my findings and the fact that the horse led up reluctantly. My observation of two DQPs who checked the horse before I did, both of them found the horse to be bilaterally sore.

. . . .

BY MS. CARROLL:

Q. Based on your documentation which contains the statement that the horse's way of going was stiff.

[BY DR. SMITH:]

A. Uh-huh.

> Q. Or appeared a little stiff, would you believe that this horse would experience pain if it were shown in the show ring immediately following your examination?
>
> A. I'd have to say yes because he's already showing me by his locomotion that something's not right. Now when I said that I didn't know earlier about whether or not the horse was going to experience pain, I was specifically addressing those painful areas to palpation, and looked at the whole picture of this particular horse, the fact that he was already abnormal as far as his locomotion went. Horses don't walk cautiously without a reason. There's something that's causing him to walk stiff, so that there's something going on.

Tr. 46, 108-09.

Sixth, Respondents contend the ALJ erroneously gave no weight to Charles L. Thomas' testimony (Respondents' Appeal Pet. at 9-10).

Respondents do not cite the portion of the Initial Decision and Order in which the ALJ states that he gives no weight to Charles L. Thomas' testimony, and I cannot locate the portion of the Initial Decision and Order in which the ALJ states that he gives no weight to Charles L. Thomas' testimony.

I have carefully reviewed Charles L. Thomas' testimony. On the basis of that review, I find Charles L. Thomas credible. However, Charles L. Thomas' testimony does not rebut Complainant's evidence that Double Pride Lady was sore. Charles L. Thomas testified that he observed Double Pride Lady's movement, but did not examine her. Charles L. Thomas also testified that, when he observed Double Pride Lady, he formed no opinion regarding whether Double Pride Lady was sore under the Horse Protection Act and could not testify regarding whether Double Pride Lady was sore when William J. Reinhart entered Double Pride Lady at the National Walking Horse Trainers Show. (Tr. 129, 134, 138, 145-50.)

Respondents also contend Charles L. Thomas was the chief witness for the United States Department of Agriculture during the administrative hearing in *In re William Earl Bobo*, 53 Agric. Dec. 176 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995), and the United States Department of Agriculture "considers Mr. Thomas to be a valid witness when he is testifying for the [United States Department of Agriculture's] side that a horse was sore, but that his testimony deserves 'zero weight' when he is testifying for a [r]espondent that the [r]espondent's horse was not sore." (Respondents' Appeal Pet. at 10.)

Again, Respondents fail to cite, and I cannot locate, any portion of the Initial Decision and Order in which the ALJ states that he gives Charles L. Thomas' testimony no weight. Moreover, Charles L. Thomas testified that he has appeared on behalf of the respondents in a number of administrative proceedings conducted under the Horse Protection Act, but that he has "never testified for the government."

(Tr. 138.) A review of *In re William Earl Bobo* reveals that Respondents' contention that Charles L. Thomas was the chief witness for the United States Department of Agriculture is not correct and that, in *In re William Earl Bobo,* Charles L. Thomas testified on behalf of the respondents. *See In re William Earl Bobo*, 53 Agric. Dec. at 186.

Seventh, Respondents contend the United States Department of Agriculture takes the position that palpation is 100 percent accurate, subject to no possibility of error (Respondents' Appeal Pet. at 10).

The United States Department of Agriculture has long held that palpation is a highly reliable method for determining whether a horse is "sore," as defined in the Horse Protection Act.[12] The United States Department of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act. However, the United States Department of Agriculture does not take the position that palpation is 100 percent accurate and not subject to error. Respondents do not cite any basis for their assertion that the United States Department of Agriculture takes the position that palpation is 100 percent accurate and not subject to error, and I cannot locate any case in which the Judicial Officer has taken that position.

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[12]*See, e.g., In re David Tracy Bradshaw*, 59 Agric. Dec. ___, slip op. at 11, 18 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 836 (1996); *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24).

Eighth, Respondents contend the United States Department of Agriculture does not admit or consider any evidence that contradicts testimony given by veterinarians employed by the United States Department of Agriculture and does not consider evidence that challenges the United States Department of Agriculture's "political and programmatic agenda"[13] (Respondents' Appeal Pet. at 10-11).

Section 1.141(h)(1)(iv) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)) provides that evidence may be excluded only as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence*–(1) *In general*. . . .
>
> . . . .
>
> (iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Section 1.141(h)(1)(iv) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iv)) does not provide that an administrative law judge or the Judicial Officer may exclude evidence merely because the evidence contradicts testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenges the United States Department of Agriculture's "political and programmatic agenda." Respondents do not cite any proceeding in which an administrative law judge or the Judicial Officer excluded evidence merely because the evidence contradicted testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenged the United States Department of Agriculture's "political and programmatic agenda." Moreover, I cannot locate any administrative proceeding conducted under the Rules of Practice in which an administrative law judge or the Judicial Officer excluded evidence merely because the evidence contradicted testimony given by veterinarians employed by the United States Department of Agriculture or because the evidence challenged the United States Department of Agriculture's "political and programmatic agenda." Further still, the record in this proceeding does not indicate that the ALJ excluded evidence because the evidence contradicted Dr. Slauter's or Dr. Smith's testimony or because the evidence challenged the United States

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[13]I am not certain of the meaning of Respondents' reference to evidence which challenges the United States Department of Agriculture's "political and programmatic agenda." However, the Rules of Practice identify evidence which shall be excluded insofar as practicable and there is no provision for the exclusion of evidence which challenges the United States Department of Agriculture's "political and programmatic agenda."

Department of Agriculture's "political and programmatic agenda."

Ninth, Respondents contend United States Department of Agriculture administrative proceedings conducted under the Horse Protection Act are unfair because the veterinarians and investigators who testify, the attorneys who represent the complainants, and the administrative law judges who preside at the hearings are all employees of the United States Department of Agriculture (Respondents' Appeal Pet. at 12-13).

Dr. Slauter and Dr. Smith, the two veterinarians who testified in this proceeding; Colleen A. Carroll, the attorney who represents Complainant; and the ALJ were United States Department of Agriculture employees at the time of the hearing (Tr. 4, 14, 85, 334). While J.R. Odle, the investigator who testified, was not an employee of the United States Department of Agriculture at the time of the hearing, he was a former United States Department of Agriculture employee (Tr. 174). However, Respondents do not cite any authority for their contention that an administrative proceeding is unfair if the veterinarians and investigators who testify, the complainant's attorney, and the administrative law judge are all employed by the agency conducting the administrative proceeding. I find Respondents' contention is without merit.

An agency may combine investigative, adversarial, and adjudicative functions as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case does not participate in or advise in the decision or agency review in the case or a factually related case. (5 U.S.C. § 554(d).)[14] Respondents do not assert that a United States Department of Agriculture

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[14] *See also Sheldon v. SEC*, 45 F.3d 1515, 1518-19 (11th Cir. 1995) (holding that Securities and Exchange Commission proceedings do not violate the "separation of powers" or deny broker-dealers due process of law merely because the agency combines investigative, adversarial, and adjudicative functions); *Trust & Investment Advisers, Inc. v. Hogsett*, 43 F.3d 290, 297 (7th Cir. 1994) (stating it has long been settled that the combination of investigative and adjudicative functions within an agency, absent more, does not create an unconstitutional risk of bias in administrative adjudication); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994) (per curiam) (stating an agency may combine investigative, adversarial, and adjudicative functions, as long as no employees serve in dual roles); *Greenberg v. Board of Governors of the Federal Reserve System*, 968 F.2d 164, 167 (2d Cir. 1992) (stating the Administrative Procedure Act is violated only where an individual actually participates in a single case as both a prosecutor and an adjudicator); *Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979) (stating it is uniformly accepted that many agencies properly combine the functions of prosecutor, judge, and jury, and a hearing conducted by such an agency does not automatically violate due process); *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940) (stating the blending of the functions of enforcement and adjudication in a single agency is not sufficient to invalidate a hearing fairly conducted); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1124 (1998) (stating an agency may combine investigative, adversarial, and adjudicative functions, as long as an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case, does not participate in or advise in the decision or

employee or agent engaged in the performance of investigative or prosecuting functions in this proceeding, participated in or advised in the ALJ's Initial Decision and Order, or the agency review of the ALJ's Initial Decision and Order. Further, the record contains no indication that a United States Department of Agriculture employee or agent engaged in the performance of investigative or prosecuting functions in this proceeding, participated in or advised in the ALJ's Initial Decision and Order or the agency review of the ALJ's Initial Decision and Order.

Respondents also assert Dr. Slauter, Dr. Smith, J.R. Odle, Colleen A. Carroll, and the ALJ traveled together to the hearing, ate lunch together, and appeared "to be a team" (Respondents' Appeal Pet. at 13).

Respondents do not cite, and I cannot locate, any evidence that supports Respondents' assertion that Dr. Slauter, Dr. Smith, J.R. Odle, Colleen A. Carroll, and the ALJ traveled together to the hearing, ate lunch together, and appeared "to be a team."

Tenth, Respondents contend administrative law judges in United States Department of Agriculture administrative proceedings are biased in favor of the United States Department of Agriculture (Respondents' Appeal Pet. at 13-16).

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agency review in the case or a factually related case), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam).

Due process requires an impartial tribunal, and a biased administrative law judge who conducts a hearing unfairly deprives the litigant of this impartiality.[15] Further, the Administrative Procedure Act requires an impartial proceeding, as follows:

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[15] *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (stating a fair trial in a fair tribunal is a basic requirement of due process and this requirement applies to administrative agencies, which adjudicate, as well as to the courts; not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968) (stating any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias); *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998) (stating due process guarantees a hearing concerning the deprivation of life or a recognized property or liberty interest before a fair and impartial tribunal and this guarantee applies to administrative adjudications as well as those in the courts), *cert. denied*, 525 U.S. 1068 (1999); *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (stating essential to a fair administrative hearing is an unbiased judge); *Grant v. Shalala*, 989 F.2d 1332, 1345 (3d Cir. 1993) (stating bias on the part of administrative law judges may undermine the fairness of the administrative process); *Roach v. NTSB*, 804 F.2d 1147, 1160 (10th Cir. 1986) (stating due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal), *cert. denied*, 486 U.S. 1006 (1988); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (stating trial before an unbiased judge is essential to due process and that this rule of due process is applicable to administrative as well as judicial adjudications); *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 782 (11th Cir. 1984) (stating a fair hearing requires an impartial arbiter); *Helena Laboratories Corp. v. NLRB*, 557 F.2d 1183, 1188 (5th Cir. 1977) (stating a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating a litigant's entitlement to a tribunal graced with an unbiased adjudicator obtains in administrative proceedings); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating an adjudicatory hearing before an administrative tribunal must afford a fair trial in a fair tribunal as a basic requirement of due process), *cert. denied*, 434 U.S. 834 (1977); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (stating a fair hearing requires an impartial trier of fact); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962) (stating quasi-judicial proceedings entail a fair trial and fairness requires an absence of actual bias in the trial of cases and our system of law has always endeavored to prevent even the appearance of bias); *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) (stating a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge); *Continental Box Co. v. NLRB*, 113 F.2d 93, 95-96 (5th Cir. 1940) (stating it is the essence of a valid judgment that the body that pronounces judgment in a judicial or quasi-judicial proceeding be unbiased); *Inland Steel Co. v. NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (stating trial by a biased judge is not in conformity with due process and the recognition of this principle is as essential in proceedings before administrative agencies as it is before the courts).

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

. . . The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. § 556(b).

However, a substantial showing of legal bias is required to disqualify an administrative law judge or to obtain a ruling that the hearing is unfair.[16]

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[16] *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998) (stating an administrative law judge enjoys a presumption of honesty and integrity which is only rebutted by a showing of some substantial countervailing reason to conclude that the administrative law judge is actually biased with respect to factual issues being adjudicated), *cert. denied*, 525 U.S. 1068 (1999); *Akin v. Office of Thrift Supervision*, 950 F.2d 1180, 1186 (5th Cir. 1992) (stating in order to disqualify an administrative law judge for bias, the moving party must plead and prove, with particularity, facts that would persuade a reasonable person that bias exists); *Gimbel v. CFTC*, 872 F.2d 196, 198 (7th Cir. 1989) (stating in order to set aside an administrative law judge's findings on the grounds of bias, the administrative law judge's conduct must be so extreme that it deprives the hearing of that fairness and impartiality necessary to fundamental fairness required by due process); *Miranda v. NTSB*, 866 F.2d 805, 808 (5th Cir. 1989) (stating a substantial showing of bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair); *NLRB v. Webb Ford, Inc.*, 689 F.2d 733, 737 (7th Cir. 1982) (stating the standard for determining whether an administrative law judge's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for a hearing before a new administrative law judge is an exacting one, and requires that the administrative law judge's conduct be so extreme that it deprives the hearing of that fairness and impartiality necessary to that fundamental fairness required by due process); *Nicholson v. Brown*, 599 F.2d 639, 650 (5th Cir. 1979) (stating in order to maintain

Respondents cite no evidence that indicates the ALJ was biased in favor of Complainant in this proceeding. I have reviewed the record in this proceeding, and I find no basis for Respondents' contention that the ALJ was biased in favor of Complainant in this proceeding.

The Administrative Procedure Act contains a number of provisions designed to ensure independent decision-making by administrative law judges. First, the Administrative Procedure Act provides that administrative law judges may only be removed for good cause established and determined by the Merit Systems Protection Board on the record after an opportunity for hearing before the Merit Systems Protection Board (5 U.S.C. § 7521). Second, the Administrative Procedure Act prohibits an administrative law judge from consulting a person or party on a fact in issue, unless on notice and opportunity for all parties to participate (5 U.S.C. § 554(d)(1)). Third, the Administrative Procedure Act prohibits an administrative law judge from being responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the agency (5 U.S.C. § 554(d)(2)). Fourth, the Administrative Procedure Act prohibits an employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case from participating in or advising in the decision in that case or a factually related case (5 U.S.C. § 554(d)).

In response to questions by William J. Reinhart, the ALJ explained the employment status of administrative law judges and the protections designed to ensure that administrative law judges can render impartial decisions, as follows:

> JUDGE BERNSTEIN: Okay. Before we conclude the hearing, is there anything else that we need to refer to before closing this record?
>
> MS. CARROLL: No.
>
> MR. REINHART: Yes. I would like to make an inquiry of you, Your Honor. I saved this until the end of the hearing on purpose. I would like for you to explain to me what your status is as an administrative law judge. Are you an employee of the U.S. Department of Agriculture or are you an independent contractor -- could you explain your status? And I'm not saying that in any derogatory way. I'm saying that in terms that it will help

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a claim of personal bias on the part of an administrative tribunal, there must be a substantial showing); *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976) (stating a substantial showing of personal bias is required to disqualify a hearing officer or to obtain a ruling that the hearing is unfair), *cert. denied*, 434 U.S. 834 (1977); *United States ex rel. DeLuca v. O'Rourke*, 213 F.2d 759, 763 (8th Cir. 1954) (stating it requires a substantial showing of bias to disqualify a hearing officer or to justify a ruling that the hearing was unfair).

me --

JUDGE BERNSTEIN: It's a valid question. I am an employee of the United States Department of Agriculture. I was selected as a federal administrative law judge through a selection process that involves a rigorous evaluation of my credentials, many references, a written examination and an oral interview. Administrative law judges with the federal government, if they've been selected, have their names placed on a register filed by the Office of Personnel Management. From that register, they are selected by the agency for whom they are employed. And as I've indicated, I am an employee of the United States Department of Agriculture just as federal circuit, district and supreme court judges are employees of the federal government and state judges are employees of the state government.

I am not evaluated as to my performance by the Department of Agriculture, they are not allowed to evaluate my performance, they are not allowed to comment upon my decisions one way or the other. This is to guarantee the independence of federal administrative law judges. Federal administrative law judges cannot receive any bonuses, they cannot receive any awards for their work other than their pay and they cannot be penalized in any way for their decisions. This is all to guarantee their independence.

Any questions?

MR. REINHART: Yes. Do you have life tenure?

JUDGE BERNSTEIN: Yes

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MR. REINHART: You're appointed for life.

JUDGE BERNSTEIN: Yes.

MR. REINHART: And you can only be removed for cause.

JUDGE BERNSTEIN: Yes.

MR. REINHART: Same requirements as any federal judge, district judge --

JUDGE BERNSTEIN: Essentially the same.

MR. REINHART: And you work exclusively for the Department of

Agriculture?

JUDGE BERNSTEIN: Yes.

MR. REINHART: Thank you.

JUDGE BERNSTEIN: Any other questions?

(No response.)

Tr. 334-36.

Respondents do not cite, and I cannot locate, any evidence that indicates the ALJ's independence was compromised in any way or that an employee of the United States Department of Agriculture violated the Administrative Procedure Act.

Eleventh, Respondents contend the Judicial Officer's role in United States Department of Agriculture administrative proceedings is to enforce the United States Department of Agriculture's "political or policy agenda"[17] (Respondents' Appeal Pet. at 14-16). Respondents do not cite any basis for their contention that the Judicial Officer's role is to enforce the United States Department of Agriculture's "political or policy agenda."

The Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), also called the Schwellenbach Act, authorizes the Secretary of Agriculture to delegate regulatory functions to an employee of the United States Department of Agriculture. Pursuant to the Schwellenbach Act, the Secretary of Agriculture delegated authority to the Judicial Officer to act as final deciding officer in adjudicatory proceedings instituted under the Horse Protection Act (7 C.F.R. § 2.35). Neither the Schwellenbach Act nor the delegation of authority from the Secretary of Agriculture to the Judicial Officer describes the Judicial Officer's role as the enforcer of the United States Department of Agriculture's "political or policy agenda."

The mission of the Judicial Officer is to issue final decisions in United States Department of Agriculture adjudicatory proceedings. The goal of the Judicial Officer is to issue final decisions which are clearly written, well-reasoned, and consistent with United States Department of Agriculture policy and the law.

United States Department of Agriculture policy requires that the Judicial Officer

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[17]I am not certain of the meaning of Respondents' reference to the United States Department of Agriculture's "political or policy agenda." However, the Judicial Officer's functions are described in the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and in the delegation of authority from the Secretary of Agriculture to the Judicial Officer (7 C.F.R. § 2.35). Neither the Act of April 4, 1940, nor the delegation of authority from the Secretary of Agriculture to the Judicial Officer indicate that the role of the Judicial Officer is the enforcement of the United States Department of Agriculture's "political or policy agenda."

render impartial decisions in administrative proceedings. A number of statutory and regulatory provisions and institutional practices are designed to ensure that the Judicial Officer can render impartial decisions in administrative proceedings. The Administrative Procedure Act requires that the functions of the Judicial Officer must be conducted in an impartial manner (See 5 U.S.C. § 556(b)). Between the institution of a proceeding and the issuance of a final decision, the Judicial Officer is prohibited from discussing ex parte the merits of a proceeding (See 5 U.S.C. § 557(d); 7 C.F.R. § 1.151). The Judicial Officer has no responsibility for investigation, prosecution, or advocacy and is not responsible to, supervised by, or directed by any employee or agent engaged in the investigative or prosecuting functions of the United States Department of Agriculture.[18]

Further, no United States Department of Agriculture employee or official has ever discussed the merits of an ongoing administrative proceeding with me, without the opportunity for all parties to the proceeding to be present. During my employment as the Judicial Officer, my performance has never been evaluated and I have never been rewarded, promoted, demoted, penalized, or reprimanded for a decision, ruling, or any other action.

Twelfth, Respondents contend the Horse Protection Act is an unconstitutional exercise of power under the Commerce Clause of the United States Constitution because activities regulated under the Horse Protection Act do not affect interstate commerce (Respondents' Appeal Pet. at 16-27).

Respondents raised this very same issue before the ALJ. The ALJ opined that the Horse Protection Act regulates activities that substantially affect interstate commerce and is not unconstitutional (Initial Decision and Order at 8-10). I agree with the ALJ's opinion. Moreover, with minor modifications, which are reflected in this Decision and Order, *supra*, I agree with the ALJ's discussion of the issue. Therefore, I reject Respondents' contention that the Horse Protection Act is an unconstitutional regulation of intrastate activity in violation of the Commerce Clause.

Thirteenth, Respondents contend the Horse Protection Act is not necessary because the National Horse Show Commission prohibits the showing of sore horses (Respondents' Appeal Pet. at 25-26).

I disagree with Respondents' contention that the Horse Protection Act is not necessary. Contrary to Respondents' contention that the Horse Protection Act is unnecessary, Congress makes a specific finding in section 3(5) of the Horse Protection Act (15 U.S.C. § 1822(5)) that regulation under the Horse Protection Act by the Secretary of Agriculture is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce. The primary purpose of the Horse Protection Act is to stop the cruel, inhumane, and unfair practice of soring horses

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[18]Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 Geo. Wash. L. Rev. 277, 284 (1957).

(15 U.S.C. § 1822(1)-(2)). Congress specifically addressed the need for the Horse Protection Act in connection with legislative history applicable to 1976 Horse Protection Act amendments, as follows:

NEED FOR LEGISLATION

The inhumanity of the practice of "soring" horses and its destructive effect upon the horse industry led Congress to pass the Horse Protection Act of 1970 (Public Law 91-540, December 9, 1970). The 1970 law was intended to end the unnecessary, cruel and inhumane practice of soring horses by making unlawful the exhibiting and showing of sored horses and imposing significant penalties for violations of the Act. It was intended to prohibit the showing of sored horses and thereby destroy the incentive of owners and trainers to painfully mistreat their horses.

The practice of soring involved the alteration of the gait of a horse by the infliction of pain through the use of devices, substances, and other quick and artificial methods instead of through careful breeding and patient training. A horse may be made sore by applying a blistering agent, such as oil or mustard, to the p[a]stern area of a horse's limb, or by using various action or training devices such as heavy chains or "knocker boots" on the horse's limbs. When a horse's front limbs are deliberately made sore, the intense pain suffered by the animal when the forefeet touch the ground causes the animal to quickly lift its feet and thrust them forward. Also, the horse reaches further with its hindfeet in an effort to take weight off its front feet, thereby lessening the pain. The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds. Since the passage of the 1970 act, the bleeding horse has almost disappeared but soring continues almost unabated. Devious soring methods have been developed that cleverly mask visible evidence of soring. In addition the sore area may not necessarily be visible to the naked eye.

The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed. A mediocre horse whose high-stepping gait is achieved artificially by soring suffers from pain and inflam[m]ation of its limbs and competes unfairly with a properly and patiently trained sound horse with championship natural ability. Horses that attain championship status are exceptionally valuable as breeding stock, particularly if the champion is a stallion. Consequently, if champions continue to be created by soring, the breed's natural gait abilities cannot be preserved. If the widespread soring

> of horses is allowed to continue, properly bred and trained "champion" horses would probably diminish significantly in value since it is difficult for them to compete on an equal basis with sored horses.
>
> Testimony given before the Subcommittee on Health and the Environment demonstrated conclusively that despite the enactment of the Horse Protection Act of 1970, the practice of soring has continued on a widespread basis. Several witnesses testified that the intended effect of the law was vitiated by a combination of factors, including statutory limitations on enforcement authority, lax enforcement methods, and limited resources available to the Department of Agriculture to carry out the law.

H.R. Rep. No. 94-1174, at 4-5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99.

The facts in this proceeding and other proceedings that have been appealed to the Judicial Officer establish that the practice of soring horses has not stopped.[19]

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[19] *See, e.g., In re David Tracy Bradshaw*, 59 Agric. Dec. ___ (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Stephen Douglas Bolton*, 58 Agric. Dec. 254 (1999); *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543 (1997); *In re David Hubbard* (Decision as to David Hubbard), 56 Agric. Dec. 617 (1997); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gerald Funches*, 56 Agric. Dec. 517 (1997); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re Johnny E. Lewis* (Decision on Remand as to Jerry M. Morrison), 55 Agric. Dec. 246 (1996), *aff'd per curiam*, 111 F.3d 897 (11th Cir. 1997); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221 (1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301 (1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214 (1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re Glen O. Crowe*, 52 Agric. Dec.

Despite the efforts of the National Horse Show Commission to stop the showing of sore horses, the practice of soring horses continues and the Horse Protection Act is necessary. Therefore, I reject Respondents' contention that the Horse Protection Act is unnecessary because the National Horse Show Commission prohibits the showing of sore horses.

Moreover, even if I found the Horse Protection Act unnecessary (which I do not find), that finding would have no effect on the outcome of this proceeding.

Fourteenth, Respondents contend the Horse Protection Act violates the Tenth Amendment to the United States Constitution (Respondents' Appeal Pet. at 26).

The Tenth Amendment to the United States Constitution provides, as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

Respondents cite *New York v. United States*, 505 U.S. 144 (1992), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in support of their contention that the Horse Protection Act violates the Tenth Amendment to the United States Constitution. In *New York v. United States*, the Supreme Court held the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 infringed upon state sovereignty in violation of the Tenth Amendment to the United States Constitution because the provision required the states to regulate. 505 U.S. at 178. In *Gregory v. Ashcroft*, the High Court stated that the authority of the people of the states to determine the qualifications for office of state government officials is a power reserved to the states under the Tenth Amendment and the Guarantee Clause of the United States Constitution. 501 U.S. at 463.

The Horse Protection Act does not require the states to regulate and does not infringe on the authority of the people of the states to determine the qualifications for office of state government officials. Therefore, I find *New York v. United States* and *Gregory v. Ashcroft* inapposite, and I find no basis for Respondents' contention

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1132 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272 (1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252 (1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181 (1978).

that the Horse Protection Act violates the Tenth Amendment to the United States Constitution.

Fifteenth, Respondents contend the "finding" of the ALJ was not supported by evidence in the record (Respondents' Appeal Pet. at 28).

Respondents do not identify which finding of fact they believe is not supported by evidence in the record. I have reviewed the entire record in this proceeding. Except with respect to the ALJ's findings regarding co-ownership of Reinhart Stables and Double Pride Lady, I find that the ALJ's findings of fact are supported by reliable, probative, and substantial evidence.

Respondents seek dismissal of the proceeding and referral of the proceeding to a United States district court (Respondents' Appeal Pet. at 28-29).

I find no basis for dismissal of this proceeding. The Judicial Officer has no authority under the Rules of Practice to refer a proceeding to a district court of the United States.[20] Moreover, appeal of this proceeding does not lie to any United States district court. Instead, section 6(b)(2) and (c) of the Horse Protection Act (15 U.S.C. § 1825(b)(2), (c)) provides that a person against whom a violation is found and a civil sanction is imposed may obtain judicial review in the court of appeals of the United States for the circuit in which such person resides or has his or her place of business or the United States Court of Appeals for the District of Columbia Circuit.

Respondents' Motion Requesting A List of Citations

Respondents request the citations of any cases instituted by the United States Department of Agriculture under the Horse Protection Act after June 7, 1995, in the United States Court of Appeals for the Fifth Circuit (Motion to Request Documents).

Disciplinary administrative proceedings instituted under the Horse Protection Act are required to be instituted before the Secretary of Agriculture (15 U.S.C. § 1825(b)). I am not aware of any administrative proceeding under the Horse Protection Act in which the complainant instituted the proceeding in the United States Court of Appeals for the Fifth Circuit. Moreover, I am not aware of any document listing citations to administrative proceedings instituted by the United States Department of Agriculture under the Horse Protection Act in the United States Court of Appeals for the Fifth Circuit. Therefore, Respondents' Motion to

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[20] *In re Jack* Stepp, 59 Agric. Dec. ___, slip op. at 4 (Apr. 26, 2000) (Order Lifting Stay); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302, 305 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue). *Cf. In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 492 (1997) (stating the chief administrative law judge does not have authority to transfer a case to a district court of the United States under the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

Request Documents is denied.

Respondents' Motion for Transcript

Respondents request that I provide the hearing transcript to them at no cost (Motion Re: Administrative Law Judge's Decision and Order). Section 1.141(i)(3) of the Rules of Practice (7 C.F.R. § 1.141(i)(3)) provides that transcripts of hearings shall be made available to any person at actual cost of duplication. Therefore, Respondents' request for a transcript at no cost is denied.

Respondents state that they want the transcript of the hearing in order to address the ALJ's reference in the Initial Decision and Order to William J. Reinhart's age and health. The ALJ states "[w]ere it not for Mr. Reinhart's age and ill health, the penalties assessed would be much harsher." (Initial Decision and Order at 12.) Complainant proposes that I delete the ALJ's reference to William J. Reinhart's age and health, and I disqualify William J. Reinhart from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction for 8 years (Complainant's Response to Respondent William J. Reinhart's Motion Re: Administrative Law Judge's Decision and Order at 3).

I do not adopt the ALJ's reference to William J. Reinhart's age and health in this Decision and Order. Age and health are not relevant factors to be taken into consideration when determining the appropriate sanction for a violation of the Horse Protection Act.[21] I reject Complainant's proposal to increase the period of disqualification imposed on William J. Reinhart by the ALJ from 5 years to 8 years. I find that a 5-year disqualification is sufficient to deter William J. Reinhart and other potential violators from future violations of the Horse Protection Act.

Complainant's Appeal Petition

Complainant contends the ALJ erroneously found Reinhart Stables is merely a

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[21] *Cf. In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 96-97 (1997) (Order Denying Pet. for Recons.) (stating the respondent's age is not a relevant factor to be taken into consideration when determining the appropriate sanction for violations of the Agricultural Marketing Agreement Act of 1937, as amended); *In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating the respondent's age cannot be considered either as a defense to the respondent's violations of the Animal Welfare Act, as amended [hereinafter the Animal Welfare Act], or as a mitigating factor to be taken into consideration when determining the appropriate sanction for a violation of the Animal Welfare Act); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 258 (1997) (stating the failing health of the corporate respondent's president cannot be considered either as a defense to the respondent's violations of the Animal Welfare Act or as a mitigating factor to be taken into consideration when determining the appropriate sanction for a violation of the Animal Welfare Act), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999).

name under which William J. Reinhart does business and erroneously declined to find Reinhart Stables violated sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)) (Complainant's Appeal Pet. at 1). Complainant asserts Reinhart Stables is a partnership, which has been owned and operated by William J. Reinhart and Judith Reinhart since 1980, and Reinhart Stables is the owner of Double Pride Lady (Complainant's Appeal Pet. at 4-5).

Complainant, as the proponent of an order, has the burden of proof in this proceeding,[22] and the standard of proof by which this burden is met is the preponderance of the evidence standard.[23] While the record does contain some evidence that Reinhart Stables is a partnership, I do not find that the evidence is sufficiently strong to reverse the ALJ. Further, I note Complainant did not allege that Reinhart Stables is a partnership. Instead, Complainant alleges that Reinhart Stables is an unincorporated association or a sole proprietorship (Amended Compl.

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[22] *See* 5 U.S.C. § 556(d).

[23] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re David Tracy Bradshaw*, 59 Agric. Dec. ___, slip op. at 10-11 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

¶ 2) and states Reinhart Stables appears to be controlled by William J. Reinhart (Motion to Amend Compl. ¶ 5). Therefore, I reject Complainant's contention that Reinhart Stables is a partnership which has been owned and operated by William J. Reinhart and Judith Reinhart since 1980.

Moreover, I do not find that Reinhart Stables was the owner of Double Pride Lady when Double Pride Lady was entered at the National Walking Horse Trainers Show. While Complainant introduced some evidence that Reinhart Stables owned Double Pride Lady (CX 2), the preponderance of the evidence establishes that William J. Reinhart was the owner of Double Pride Lady on October 28, 1998 (CX 3, CX 6, CX 11, CX 12, CX 15). Therefore, I reject Complainant's contention that the ALJ erroneously failed to conclude Reinhart Stables violated sections 5(2)(B) and 5(2)(D) of the Horse Protection Act (15 U.S.C. §§ 1824(2)(B), 1824(2)(D)).

I agree with the ALJ's conclusion that Reinhart Stables is merely a name under which William J. Reinhart does business (Initial Decision and Order at 4), and I have restated the ALJ's Initial Decision and Order to eliminate those findings of fact and conclusions which appear to conflict with the ALJ's conclusion that William J. Reinhart does business as Reinhart Stables.

Order

1. William J. Reinhart is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

William J. Reinhart's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on William J. Reinhart. William J. Reinhart shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0013.

2. William J. Reinhart is disqualified for a period of 5 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse

show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

This 5-year period of disqualification is to be served consecutive to the disqualification of William J. Reinhart ordered in *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206). The disqualification shall become effective on the 60th day after service of this Order on William J. Reinhart.

3. William J. Reinhart has the right to obtain review of this Order in the court of appeals of the United States for the circuit in which William J. Reinhart resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. William J. Reinhart must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. (15 U.S.C. § 1825(b)(2), (c).) The date of this Order is November 9, 2000.
